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U.S. Citizenship
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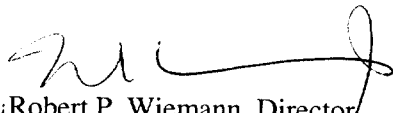
IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, PointMatch USA, states that it is a wholly-owned subsidiary of an Israeli company, PointMatch Ltd. The petitioner states that is responsible for the marketing, operation, and administration of an on-line dating service. The U.S. entity was incorporated in Delaware and began operating in New York in February 2001. The petitioner seeks to employ the beneficiary temporarily in the United States as its research and development manager at an annual salary of \$60,000.

On October 9, 2002, the director determined that the beneficiary did not qualify as a manager or executive. Consequently, the director denied the petition.

On appeal, counsel for the petitioner asserts that the beneficiary's proposed duties are primarily managerial.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The only issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

When examining the executive or managerial capacity of the beneficiary, Citizenship & Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2 (l) (3) (ii). In this instance, in a letter attached to the petition, the petitioner stated that the beneficiary is currently the technical project manager for the foreign company. The petitioner stated it wished to transfer the beneficiary to the United States in the position of research and development manager for the U.S. company. The petitioner explained that the beneficiary will manage and direct all of the U.S. company's and the foreign company's research and development activities from the design stage, through the development process, and through implementation, testing and deployment. The petitioner also stated that the beneficiary will be responsible for:

- consulting with internal management and review project proposals to determine goals, time frames, funding scope, procedures for accomplishing the goals of the project, staffing requirements and resource allocation
- plans formulates and define the technical scope and objective of the project, and develop specifications for the required [sic] From this information [the beneficiary] will develop project applications or enhancements.
- assign duties, responsibilities and scope of authority to project on daily basis to ensure progress and adherence to schedule and budget.
- prepare project status reports and keep upper management informed of project's progress.

- confer with project personnel to provide advice and resolve problems, including mentoring the team in existing and eme [sic].
- coordinate the recruitment of project personnel, and interview technical staff.

On September 25, 2002, the director issued a request for evidence and stated that additional evidence is needed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States firm. Specifically, the director requested the following:

- an organizational chart for the United States entity and indicate where the beneficiary will assume a role in a managerial capacity.
- a comprehensive description of the beneficiary's proposed duties. Also indicate how the beneficiary's duties will be managerial or executive in nature . . . substantiate that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, if appropriate.
- submit a complete position description for and educational credentials of all of the beneficiary's subordinates in the United States.
- submit a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis.

On October 1, 2002, the petitioner responded to the director's request for evidence. The petitioner provided a letter containing additional information regarding the need for the beneficiary at the United States company. The petitioner stated that the beneficiary would be responsible for the following:

- Project Management 20% [of time]: Design software tools for company's products and create specifications to meet objectives. Assign projects. Staff project teams. Monitor progress of work performed by subordinates on a daily basis. Maintain ongoing communication. Confer with project personnel. Manage budget for project. Prepare status reports.
- Project Planning and Analysis 20% [of time]: Identify performance deficiencies, initiate tech projects to address deficiencies. Research new technologies. Develop strategic plans, establish project schedules
- Administrative and Strategic Planning 25% [of time]: Oversee administration and management of company's technical infrastructure, establish standards and policies for purchasing installing and configuring new hardware software and peripheral equipment. Maintain inventory of company's equipment. Purchase hardware software, represent company at meetings, maintain effective purchasing procedures.
- Supervision and Training 15% [of time]: Directly supervises the day-to-day activities of programmers, developers, and system administrator.

- Technical Management 15% [of time]: Manage and direct all technical functions of the company including supervising customer support personnel on a daily basis.

Additionally, the petitioner submitted an organizational chart for the U.S. company which indicated that the beneficiary's position would supervise one programmer in the United States and supervise four employees based at the Israeli parent company. The petitioner attached a listing of position descriptions with the credentials required for each position. Counsel for the petitioner stated that the beneficiary would supervise the Content and Customer Support Manager and a customer support professional 50 percent of their time. However, the organizational chart listed the Content and Customer Support Manager under a different supervisor. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Additionally, counsel asserted that the beneficiary would supervise additional staff that the beneficiary intends to hire.

The director denied the petition and stated that the description of the proposed job duties was vague and did not describe the day-to-day duties of the beneficiary. The director found that the description paraphrased the definitions of manager and executive found in CIS regulations. The director stated that a review of the duties of the beneficiary's subordinate does not persuasively demonstrate that the position is professional in nature. The director concluded that the beneficiary would not be involved in the supervision and control of other supervisory professional, or other managerial employees who could relieve him from performing the services of the corporation. Therefore the director found that the record as presently constituted was not persuasive in demonstrating that the beneficiary has been and would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the director based his decision on staffing levels alone. Additionally, in response to the director's statement "[i]t should be noted that your company has a plethora of managers, and given the size of your company, this service is not convinced that any of these positions is truly managerial," counsel states "the managerial nature of the other positions in the company was not at issue in this case." Furthermore, counsel states that the director's decision disregarded evidence describing nine of the beneficiary's ten subordinates. Counsel claims the director erroneously suggested that the beneficiary will have one subordinate.

Counsel also asserts that the beneficiary's subordinates in the United States will include a Content and Customer Support Manager and a Customer Support Specialist "who will each work under the beneficiary's supervision to the extent their jobs involve providing QA and technical assistance to customers (approximately 50 percent of their time)." Counsel claims the director failed to evaluate the petitioner's staffing levels in light of its reasonable needs at its current stage of development. Counsel states that the petitioner intends to transfer additional technical personnel to the U.S. company and that the beneficiary will "recruit and hire subordinates from the U.S. labor force to staff his department."

Counsel asserts that the petitioner's description was not vague and that the petitioner provided a comprehensive job description. In response to the director's determination that the beneficiary "would be engaged in non-managerial, day-to-day operations involved in fabricating a product or providing a service,"

counsel asserts that the beneficiary will not perform any non-managerial tasks, but rather will direct technical functions performed by others in the U.S. and Israeli offices.

Counsel's assertions are not persuasive. Counsel asserts that the beneficiary will supervise ten personnel. However, the U.S. organizational chart indicates that the beneficiary will manage one programmer in the United States. Additionally, counsel asserts that the beneficiary will continue to manage four employees located in Israel. Since the petitioner is relying on the beneficiary's supervision of personnel in Israel to demonstrate that the beneficiary will be working in a managerial capacity and will not be performing any non-qualifying duties, CIS will look to the record for such evidence. Although the petitioner described the job duties of the employees located in Israel, the petitioner has not provided any evidence of these positions. The petitioner has not provided names of these employees and proof of employment such as pay stubs or indicated on the foreign organizational chart that they will be in fact be supervised by the beneficiary in the United States. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, the foreign company's organizational chart is not clear in indicating which employees the beneficiary allegedly supervises. Furthermore, the petitioner is including vacant positions in the number of personnel supervised by the beneficiary. Based on the evidence in the record, the petitioner has not established that the beneficiary will be supervising ten employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Although the appeal will be dismissed, the AAO notes that the director based his decision, in part, on an improper standard. The director's comments are inappropriate. The director should not hold a petitioner to his undefined and unsupported statement that the petitioner had a "plethora of managers." The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although CIS must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some rational basis for finding a petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. 1101(a)(44)(C).

The AAO notes that counsel cites several nonprecedent decisions in support of its contention that the beneficiary will be employed in a managerial capacity. However, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Though the petitioner provided a percentage breakdown of the beneficiary's duties, some of the duties are operational, such as "maintain inventory" and "purchase hardware." The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Counsel claims “the ability of the company’s Israeli technical department to continue technical operations under the beneficiary’s supervision, while the new department is being established, relieves the beneficiary from performing non-qualifying duties.” However, many of the beneficiary’s duties described by the petitioner as managerial require the beneficiary to manage someone to relieve him from performing these duties. The petitioner states that the beneficiary will “staff projects teams” and “monitor the progress of work performed by subordinates.” However, the petitioner has not demonstrated that the beneficiary is managing a team of technical professionals that would relieve him from performing non-qualifying duties.

In this matter, the proposed position of the beneficiary is research and development manager of an on-line dating service consisting of five managers or executives and six employees. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Further, regardless of the beneficiary’s position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. Based on the limited documentation furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved

Beyond the decision of the director, it is not clear that the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The AAO notes that the Form I-129 indicated that all outstanding shares of the U.S. company are owned by the Israeli company. However, the IRS corporate tax form 1120 for the tax year 2001, Schedule E indicates that [REDACTED] owns 100 percent of the common stock of the U.S. company. Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Based on this inconsistent documentation, it cannot be determined that the petitioner and the foreign entity have the requisite qualifying relationship. As the appeal will be dismissed, this issue need not be examined further.

Furthermore, the AAO also notes that the petitioner filed an L-1B petition for this same beneficiary as a specialized knowledge worker, giving further credence to the director’s determination that the beneficiary will not be working in a managerial or executive position.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.